UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ROSENDO DELGADO, JR., Petitioner, vs. RICHARD MORGAN, Respondent.	NO. CT-03-5072-JLQ ORDER AND MEMORANDUM OPINION RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT is Petitioner, **Rosendo Delgado, Jr.'s**, Petition for Writ of Habeas Corpus. (Ct. Rec. 1). The parties have filed cross-motions for summary judgment. (Ct. Rec. 13 & 17). Respondent Richard Morgan is represented by **Christine O. Gregoire**, Attorney General of Washington, and **John J. Samson**, Assistant Attorney General. Petitioner is proceeding *pro se*.

Respondent seeks a summary judgment ruling dismissing the Petition with prejudice. Respondent contends Petitioner has not exhausted his claims in state court and the claims are procedurally barred by state law as of February 10, 2004. The Respondent further argues that if this court does reach the merits of Petitioner's claims, the state court decisions were not contrary to or an unreasonable application of clearly established Federal law and thus do not merit relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254.

Petitioner seeks summary judgment granting the Petition, reversing the conviction, and ordering a new trial. Petitioner contends that he presented his claims to both the Washington Court of Appeals and Washington Supreme Court as violations under the

United States Constitution and Washington State Constitution. Petitioner argues that his confession was coerced in violation of *Miranda* and that the trial court made other erroneous evidentiary rulings that entitle him to relief.

PRELIMINARY MATTERS

Petitioner's grounds for relief rest on a determination of the voluntariness of his confession and on assertions that the trial court's evidentiary rulings were incorrect. Voluntariness of a confession is a purely legal question. *Miller v. Fenton*, 474 U.S. 104, 110(1985). The state court findings on subsidiary questions such as length and circumstances of interrogation or defendant's familiarity with the legal process are presumed correct by this court pursuant to 2254(e)(1) which states that state-court findings of fact are presumed correct if fairly supported by the record. *Id.* at 117. Furthermore, the state court's finding as to what was said during the interrogations is a factual finding entitled to a presumption of correctness. *Robinson v. Borg*, 918 F.2d 1387, 1390(9th Cir. 1990). An evidentiary hearing is not required if the claim presents a purely legal question or may be resolved by reference to the state court record. Campbell v. Wood, 18 F.3d 662, 679 (9th Cir. 1994).

BACKGROUND

Delgado is in custody pursuant to his convictions for aggravated first degree murder and attempted first degree murder. During the commission of the crimes Delgado methodically shot four people, including nine and three year old girls. Each of the victims was shot a number of times and the three year old did not survive. At least three witnesses, several who previously knew Delgado, testified that Delgado was the shooter. Delgado admitted the shootings to the investigating officers, although he challenges the admission of his confession. On the early morning of the day following the shootings, Delgado was taken into custody and interrogated. At some point during the interrogation, Delgado said, "Maybe I should talk to a lawyer". After this comment, further discussions occurred between Delgado and other law enforcement officers. Delgado contends that the state court's failure to suppress these subsequent statements was contrary to federal

law.

The second ground raised by Delgado in his petition is that the state court erred by excluding a defense witness who would have testified to the fallibility of eye witness identification. The third ground raised is that the state court erred by allowing the prosecution to present autopsy photos and 911 recordings because they inflamed the jury and prejudiced Delgado. The fourth and final ground is that the prosecutor made improper statements during rebuttal closing argument and, of greater import, during cross-examination.

PROCEDURAL HISTORY

Petitioner was found guilty by a jury on four counts including aggravated first degree murder and judgment was entered on that verdict on August 4, 2000. Petitioner was sentenced to life in prison without the possibility of parole plus 780 months. The judgment was affirmed in an unpublished opinion of the Washington Court of Appeals on May 23, 2002. Petitioner then filed a petition for review to the Washington Supreme Court. The petition for review was denied on February 4, 2003, and the mandate issued on February 10, 2003.

Petitioner timely filed his Petition for Writ of Habeas Corpus in this court on July 11, 2003.

APPLICABLE LAW

The court must begin its analysis mindful that this is a habeas corpus proceeding, not direct review of a criminal conviction. Mr. Delgado has already had the opportunity to litigate his claims in the State courts. Washington's highest court upheld his conviction. Different principles apply on collateral review. As the Supreme Court has reminded:

> Direct review is the principal avenue for challenging a conviction. 'When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.'

Swan v. Peterson, 6 F.3d 1373, 1378 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994) (quoting *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). Under 28 U.S.C. § 2254(d), the court must accord a presumption of correctness to a state court's factual findings. However, this presumption does not apply to the state court's resolution of mixed questions of law and fact. *Acosta-Huerta v. Estelle*, 7 F.3d 139, 142 (9th Cir. 1992).

When Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), it became more difficult for prisoners to receive collateral relief by way of habeas corpus by requiring a more refined approach to considering such a petition. Under 28 U.S.C. § 2254(d)(1), this court may reverse a decision of the state courts denying relief only if that decision is (1) "contrary to or involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States" or (2) was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(1)(2); *Williams v. Taylor*, 529 U.S. 362 (2000). The statute establishes a highly deferential standard for reviewing state court rulings requiring that the state court decisions be given the benefit of the doubt. *Woodford v. Visciotti*, 537 U.S. 19 (2002)(*per curiam*).

A state court acts contrary to clearly established federal law if it applies a legal rule that contradicts a prior Supreme Court holding or if it reaches a different result from a Supreme Court case despite confronting indistinguishable facts. 28 U.S.C. § 2254(d)(1); *Williams, supra*. Clearly established federal law refers to Supreme Court holdings (as opposed to dicta) as of the time of the relevant state court decision. *Williams*, 529 U.S. at 412. Ninth Circuit law may assist a court in determining what Supreme Court law is clearly established. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000), *cert. denied* 531 U.S. 944 (2000). The Supreme Court need not have addressed the identical factual issue, but it must have clearly determined the law. *Houston v. Roe,* 177 F.3d 901, 906 (9th Cir. 1999), *cert. denied* 528 U.S. 1159 (2000).

A state court decision can involve an unreasonable application of clearly established Supreme Court precedent if the state court identified the correct governing legal rule from Supreme Court cases but unreasonably applied it to the facts of the particular state prisoner's case or if the state court unreasonably extended a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 404.

A court may also grant a habeas petition if the state court decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2). In effect, this means that the state court was wrong and the petitioner is correct. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). A determination of a factual issue made by a state court shall be presumed to be correct. The petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

DISCUSSION

I. EXHAUSTION

A state prisoner must exhaust state remedies with respect to each claim before petitioning for a writ of habeas corpus in federal court. *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Claims for relief that have not been exhausted in state court are not cognizable in a federal habeas petition. *James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994). The Supreme Court has stated that exhaustion of state remedies requires that petitioner fairly present federal claims to the state courts in order to give the State the opportunity to address and correct alleged violations of the prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995)(internal citations and quotations omitted). "If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id.* at 365.

Raising a federal claim to this court that is merely similar to the state law claim presented to the state court is insufficient to exhaust. *Id.* at 366. In regard to challenging

evidentiary rulings the *Duncan* Court stated: "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." *Id.* at 366. Further, to exhaust a claim in state court, petitioner must present the claim to the state's highest court, even if that court has discretionary control over its docket, and must alert the court to the specifically federal nature of the claim presented. *Reese v. Baldwin*, 282 F.3d 1184, 1191 (9th Cir. 2002).

Petitioner was represented by counsel when he presented his claims to both the Washington Court of Appeals and the Washington Supreme Court. In the petition for review to the Washington Supreme Court, Petitioner argued that the court should accept review because the Court of Appeals decision was in conflict with prior decisions of the Washington Supreme Court. The argument was then presented with almost exclusive citation to state law, with only one reference to a federal case, and no reference to a constitutional violation. Rather, the argument was framed in terms of error in admitting evidence and an abuse of discretion. The one reference to federal law in the petition for review is not even principally relied upon or analyzed, but was merely cited in support of the statement "other jurisdictions have found exclusion of such expert testimony to be an abuse of discretion". Further, the rule is well settled that citation to federal authority for one claim in a habeas petition is not transferred to all the other claims contained in the petition. *Reese v. Baldwin*, 282 F.3d 1184, 1193 (9th Cir. 2002).

However, failure to cite federal law is not dispositive of the exhaustion issue. "[F]or purposes of exhaustion, a citation to a state case analyzing a federal constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue." *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003). The Ninth Circuit had previously found that it was sufficient for exhaustion purposes that a claim be presented and analyzed as a federal claim to a lower state court even if not directly presented as a federal claim to the last state court to review the claim.. See *Reese v. Baldwin*, 282 F.3d 1184 (9th Cir. 2002). However, this ruling was subsequently reversed by the Supreme

Court. See *Baldwin v. Reese*, 124 S.Ct. 1347 (2004)("We consequently hold that ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.")

A. Petitioner's 1st Claim - *Miranda*/involuntary confession

In his petition for review to the Washington Supreme Court, the resolution of this claim by the Washington Court of Appeals was presented as being in conflict with prior Washington Supreme Court law, specifically *State v. Robtoy*, 98 Wn.2d 30 (1982). Under the traditional conception of exhaustion, that a claim must be presented as a federal claim and rely on federal law, this claim would not be properly exhausted. However, under the *Peterson* rationale, the claim is exhausted because *State v. Robtoy* is a state case that analyzes a federal constitutional issue and cites to numerous federal cases including *Miranda*.

B. Petitioner's 2nd Claim - Error in Excluding Expert Testimony

This claim was presented to the Washington Supreme Court as a state law issue, relying on one federal case for the proposition that "other jurisdictions have found exclusion of such expert testimony to be an abuse of discretion under similar circumstances." Again, under a traditional notion that a petitioner must clearly present his federal claim as a federal claim arising under federal law to the final state court, this claim may not be properly exhausted. However, Petitioner cited the Washington Supreme Court to *State v. Allery*, 101 Wn.2d 591 (1984), which analyzed the admissibility of expert testimony under Washington evidentiary rule 702. Washington's evidentiary rule is identical to FRE 702. Therefore, it is as though the court analyzed the claim under federal law, and under *Peterson* the claim is exhausted. See also *Sanders v. Ryder*, 342 F.3d 991 (9th Cir. 2003).

C. Petitioner's 3rd Claim - Error in admitting autopsy photos & 911 recording

Petitioner did not present his third claim to the Washington Supreme Court as a federal claim and cited only one state case, *State v. Crenshaw*, 98 Wn.2d 789 (1983). *Crenshaw* analyzed the topic under state law and explained that it is within the trial court's discretion to balance the probative versus prejudicial value of the evidence. Since *Crenshaw* was not analyzed under federal law, this claim is not exhausted under *Peterson*. Petitioner did not contend the state trial court's evidentiary rulings violated federal law or deprived him of federal constitutional rights.

The claim could still be properly exhausted under *Baldwin* if the Washington Court of Appeals analyzed the claim as a federal claim because the Washington Court of Appeals opinion was attached to the petition for review and therefore the Washington Supreme Court did not have to "read beyond" the petition. However, the Washington Court of Appeals analyzed the claim relying exclusively on state law precedent. Therefore the claim was not properly exhausted under *Baldwin*, and as stated, *infra,* is procedurally defaulted and barred. Revised Code of Washington 10.73.090(1) provides in part that "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." Since Petitioner's conviction became final on February 10, 2003 any federal constitutional claim as to this third claim was procedurally defaulted as of February 10, 2004. The third claim is not cognizable on federal habeas corpus. *Powell v. Lambert*, 357 F. 3d 871, 874 (9th Cir. 2004).

Since Petitioner's **third** claim is procedurally defaulted, this court must dismiss it without review absent a showing of cause and prejudice. See *Franklin v. Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002)(When a petitioner's claims are procedurally barred and a petitioner cannot show cause and prejudice for the default, the district court dismisses the petition because the petitioner has no further recourse in state court). If the claim is unexhausted, it may not serve as the basis for habeas relief, but can be denied on the

merits. See 28 U.S.C. § 2254(b)(2)("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). In his Petition For Habeas Corpus, Delgado neither argues or shows cause or prejudice.

Petitioner's third claim is not properly exhausted and is now procedurally defaulted. It is **DENIED with prejudice.**

D. Petitioner's 4th Claim - Prosecutorial Misconduct During Cross and Closing Argument

Petitioner presented this claim under state law relying on two Washington Supreme Court cases. These cases did not analyze the alleged prosecutorial misconduct under federal law and the claim was therefore not directly presented to that court. However, the Washington Court of Appeals did analyze the claim under federal law, citing numerous federal cases, including Supreme Court opinions and referencing the Fifth Amendment. Thus, petitioner's fourth claim was satisfactorily exhausted under *Baldwin* since the Washington Court of Appeals opinion was attached to the petition for review to the Washington Supreme Court. Had the opinion not been attached, the claim would not have been fairly presented because as the Supreme Court held in *Baldwin*, a state supreme court is not required to read beyond the petition or brief presented to it in order to find a federal claim. The Supreme Court specifically rejected a requirement that state supreme courts must read lower court opinions when reviewing post-conviction questions. *Baldwin*, 124 S. Ct. 1347, 1350 (2004).

II. MERITS OF PETITIONER'S CLAIMS

A. Petitioner's 1st Claim - *Miranda*/involuntary confession

The facts are more elaborately set forth in the opinion of the Washington Court of Appeals' unpublished opinion, but to provide some context, a brief summary of relevant facts is provided here. This court analyzes the Washington Court of Appeal's decision as the relevant state court determination because the Washington Supreme Court denied Delgado's petition without citation or comment. *Shackleford v. Hubbard,* 234 F.3d 1072,

1079 (9th Cir. 2000). However, because the Washington Court of Appeals also adopted some of the reasoning of the trial court, this court will necessarily discuss the trial court's decision. *Lewis v. Lewis*, 321 F.3d 824, 829 (9th Cir. 2003).

When Delgado was arrested, he was read his *Miranda* rights at his apartment, and again when he was placed in a holding cell at the police station. Detective Tovar was the first to question Delgado, and after some questions and responses by Delgado, Delgado said, "Maybe I should talk to a lawyer." Detective Tovar ceased questioning at this point, but did not tell his supervisor, Sergeant Merryman, that Delgado had mentioned a lawyer.

Merryman went to speak to Delgado, who again denied any involvement, and at one point in the discussion said, "I think maybe I'd better talk to an attorney." At this point Merryman ceased questioning. Delgado then asked Sgt. Merryman what the likely charges might be against his cousin, Julio, who was also in custody. When Merryman returned to the holding cell to give Delgado this information, Delgado said, "I was there." Merryman responded, "Whoa, wait a minute! You told me you wanted to talk to an attorney." Merryman then attempted to clarify whether Delgado wanted an attorney, but Delgado went on to explain his involvement in the crime including his shooting of the victims.

The trial court held a hearing to determine the admissibility of the incriminating statements. The court found that Delgado's first reference to counsel, made to Detective Tovar, was arguably equivocal, but that nonetheless all questioning should have ceased. The court suppressed all of the statements Delgado made after he first mentioned a lawyer until Delgado addressed his charging question directly to Merryman. The court found Merryman appropriately ceased questioning at that point, that Delgado himself initiated all further conversation and therefore his incriminating statements were admissible. The Washington Court of Appeals adopted this rationale and noted that Delgado did not dispute this version of events at the suppression hearing. Delgado did not claim to have made a plain and direct demand for counsel, nor did he deny making the incriminating statements.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court determined that the Fifth and Fourteenth Amendment's prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the defendant that he had the right to remain silent and the right to an attorney. *Miranda* also stated that if the defendant requests counsel "the interrogation must cease until an attorney is present." *Id.* at 474. Once an accused has invoked his right to counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). The police may not reinterrogate an accused in custody "if he has **clearly asserted** his right to counsel." *Id.* at 485 (Emphasis added). Additionally, "an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." *Smith v. Illinois*, 469 U.S. 91, 92 (1984).

However, a request for counsel must be unambiguous. *Davis v. United States*, 512 U.S. 452, 459 (1994). A suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* If the suspect's statement does not meet the requisite level of clarity, it is not required that the officer cease questioning. *Id.* If the suspect makes an ambiguous or equivocal statement, a police officer may ask clarifying questions, but is not required to do so. *Id.* at 461. In *Davis*, the Supreme Court specifically decided the issue presented by petitioner. The Court affirmed the lower courts' determinations that "Maybe I should talk to a lawyer" (the exact language now before this court) was not a request for counsel and did not require an end to questioning. *Id.* at 462. Therefore, the protections given to Delgado in suppressing the statements made after the first equivocal request were more generous than required by United States Supreme Court precedent. The Washington courts' determination that Delgado initiated the conversation after Merryman had ceased questioning is not factually challenged and is clearly supported by the record. The state courts' conclusion of law that the statements were admissible is not contrary to or an unreasonable application of Supreme Court precedent. Petitioner's

first claim is **DENIED**.

B. Petitioner's 2nd Claim - Error in Excluding Expert Testimony

Although there is a credible argument to be made that Delgado did not fairly present this issue to the state courts as a federal claim, this court has found the claim was exhausted. A federal court may deny a claim on the merits notwithstanding the failure to exhaust. 28 U.S.C. § 2254(b)(2). Delgado contends that the trial court erred in failing to admit the expert testimony of Dr. Loftus as to the unreliability of eyewitness identifications.

The Washington Court of Appeals found that the trial court held an extensive hearing at which Dr. Loftus testified. The trial court excluded the testimony on the basis that, given the substantial independent evidence of Delgado's shootings and murder, Dr. Loftus' opinions would not have helped the jury. The Washington Court of Appeals found no abuse of discretion in making this determination.

The one federal case Delgado mentions, it would be too generous to say relies upon, in his petition for review of this claim is *United States v. Downing*, 753 F.2d 1224, 1231-32 (3rd Cir. 1985). In *Downing*, the district court excluded the expert testimony of eyewitness reliability without holding a hearing as to what exactly the expert would testify. The district court also erroneously concluded that there was corroborating fingerprint and handwriting evidence, when in fact the government conceded that no such evidence was offered. The case rested almost exclusively on eyewitness identification. The Third Circuit Court of Appeals determined that under the approach taken by the district court "an expert's testimony on the reliability of eyewitnesses can never meet the test for the admissibility of expert testimony contained in Fed. R. Evid. 702". *Id.* at 1229. The Third Circuit rejected this absolute approach. The Third Circuit noted that the trial court has broad discretion and that the majority of federal courts that had addressed the issue have declined to disturb trial court rulings excluding expert testimony similar to that proffered in this case. *Id.* at 1230 n. 4. However, the court concluded that in certain cases, expert testimony on the perception of eyewitnesses would meet the helpfulness standard of

Rule 702 and remanded to the district court to determine whether to admit the specific testimony proffered in this case.

Downing does not demonstrate that the trial courts' determination in this case, after a full hearing, to exclude the testimony in this case was contrary to or an unreasonable application of clearly established Federal law nor even an abuse of discretion. The trial judge has a gatekeeping obligation under Fed. R. Evid. 702 to ensure that an expert's testimony rests on a reliable foundation and is relevant to the task at hand. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). Rule 702 requires a valid connection to the pertinent inquiry as a precondition to admissibility. *Id.* at 149.

A criminal defendant's right to present evidence is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 41-42 (1996). Trial courts may properly exclude evidence that is unreliable, confusing, misleading, or unfairly prejudicial. *Id.* The trial court found that the evidence was inadmissible as it would not assist the trier of fact in determining a fact in issue under Fed. R. Evid. 702 because there were three eyewitnesses who identified Delgado as the shooter plus other corroborating evidence, including the Defendant's confession. The Washington Court of Appeals found that in addition to Delgado's incriminating statements, the reliability of identification by the victims was enhanced by their acquaintance with Delgado and by the passage of only two hours between the attack and the witnesses' identification of Delgado as the shooter. Delgado was identified as the shooter by all three of the surviving victims. Additionally, the Ninth Circuit has stated, when considering the testimony of Dr. Elizabeth Loftus[1], an expert on the reliability of eyewitness identification, "There is no federal authority that such testimony *must* be allowed." *Jordan v. Ducharme*, 983 F.2d 933, 939 (9th Cir. 1993). The rule in the Ninth Circuit is that a ruling on the admissibility of eyewitness expert testimony is a matter within the discretion of the trial court. *See United States v. Rincon,* 28 F. 3d 921, 923 (9th

[1]The Dr. Loftus referred to in the case *sub judice* is referred to as Geoffrey Loftus by the Washington Court of Appeals, therefore the Dr. Loftus in each case is not the same individual, but both are experts in the reliability or unreliability of eyewitnesses.

Cir.) *cert. denied* 513 U.S. 1029 (1994); *United States v. Hicks*, 103 F. 3d 837, 847 (9th Cir. 1996); *United States v. Ginn*, 87 F. 3d 36, 369 (9th Cir. 1996). Since there is no federal law requirement that testimony such as that proffered by Dr. Loftus must be admitted and the trial court, after an appropriate hearing, exercised its discretion, Petitioner's claim must fail. Petitioner's second claim cannot meet the AEDPA requirement of contrary to, or an unreasonable application of, Supreme Court precedent.

Petitioner's second claim is **DENIED**.

C. Petitioner's 4th Claim - Prosecutorial Misconduct During Cross and Closing Argument

Petitioner complained to the Washington Court of Appeals that the prosecutor's conduct during defense cross-examination of the investigating officer violated *Bruton v. United States,* 391 U.S. 123 (1968)(non-testifying codefendant's confession implicating defendant is not admissible). The Washington Court of Appeals stated that during cross-examination, defense counsel Scott asked Detective Tovar whether the police had any more physical evidence linking Delgado to the crime scene at the present moment than they did on the night of the crime. The trial transcript, pages 1516-1518, shows that the question was not limited to physical evidence. Prosecutor Sullivan objected to this question and stated, in the presence of the jury:

> "Your Honor, I am going to object at this time unless [defense counsel] wants to go into the statements made by somebody else that he's objected to previously. Because if he wants to know all the evidence that we have and link this man--".

At this point, the trial judge appropriately excused the jury and defense counsel moved for a mistrial. The court held an extensive discussion, outside the presence of the jury, had a transcript prepared, and reviewed defense counsel's line of questioning and the objection. The court denied the motion for mistrial, sustained the objection, and instructed the jury that comments, statements, and arguments of attorneys are not evidence and are to be disregarded except insofar as they are supported by the evidence or the law.

The Washington Court of Appeals analyzed the situation as follows:

The transcript shows that defense counsel elicited Detective Tovar's

> admission that he had not directly accused Mr. Delgado of being the shooter during the first interview [at the police station on the day of arrest] because he was not absolutely certain who the shooter was based on the available evidence. Then counsel tried to get Detective Tovar to agree that *no new* evidence had become available since.
>
> The gist of the argument was obvious. Counsel was setting up the premises leading the jury to the logical conclusion that Detective Tovar *presently* entertained reasonable doubt about whether Mr. Delgado was the shooter and, implicitly, so must it. The prosecutor objected because the premise was false–Detective Tovar had since learned of codefendant Julio's statements implicating Mr. Delgado. But Detective Tovar was precluded by *Bruton* from mentioning this in front of the jury.

The Washington Court of Appeals found that the trial court appropriately exercised its discretion in denying the motion for mistrial.

This court's review of the state trial court transcript has revealed that defense counsel's question was not limited to additional physical evidence. Specifically, defense counsel asked the following questions leading up to the improper objection:

> Q: (By Mr. Scott) And at the time that you were questioning Rosendo you still had these nagging questions or doubts or uncertainty in your mind about whether he was the shooter, isn't that true?
>
> A: [Detective Tovar] I don't know if they are nagging questions or doubts.
>
> Q: But they existed, didn't they?
>
> A: I wasn't there when the identifications were made.
>
> Q: All right. Since that time, Detective, we really don't have - - we've analyzed the evidence and you and I have talked about that, correct?
>
> A: Yes, we have.
>
> Q: And isn't anything more that links this man to this crime, is that fair?
>
> A: The thing we have that links him to the crime is the identification by the victims.
>
> * * *
>
> Q:You didn't have - - there isn't anything else that you have today that's different from what you had that morning, isn't that true?
>
> [Prosecutor Sullivan] **Your honor, I am going to object at this time unless [defense counsel] wants to go into the statements made by somebody else that he's**

objected to previously. Because if he wants to know all the evidence that we have and link this man - - (Transcript 1516-1518).(Emphasis supplied.)

The foregoing statement of Prosecutor Sullivan in the presence of the jury was clearly improper. Although the question propounded by defense counsel to the witness was **not** limited to any further physical evidence, and may have been improper as the state trial court felt that it was, an experienced prosecutor such as Mr. Sullivan would know that the statement he made in the presence of the jury was obviously improper with attendant juror prejudice. The prosecutor's statement would lead the jury to believe that there was other evidence linking the Defendant to the crimes that the defense had "objected to previously" in order to keep it from the jury. The evidence was not admissible pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). The prosecutor's statement in the presence of the jury was one that could have brought an immediate admonition from the court and an instruction from the court to the jury to disregard the prosecutor's statements with a reminder to the jury that statements and arguments of counsel do not constitute evidence. Such an immediate reaction by the court, however, could have brought undue jury attention to Prosecutor Sullivan's improper statement and the content thereof. Judge Gavin excused the jury and after reviewing the offensive statement properly instructed the jury that statements of counsel do not constitute evidence and should be disregarded.

Sometimes, and once is too many, prosecutors fail to keep in mind their role as an attorney, an officer of the court, and a representative of a sovereign that guarantees to an individual defendant a fair and impartial trial, regardless of how heinous the charges may be. As stated in *Berger v. United States*, 295 U.S. 78, 88 (1935), an attorney serving as a prosecutor represents the state:

> . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law . . . He may prosecute with earnestness and vigor–indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods, calculated to produce a wrongful conviction as it is to use every **legitimate** means to bring about a just one. (Emphasis added).

In reviewing the record of this portion of the trial, the only reasonable conclusion is that the prosecutor, in his improper statement in the presence of the jury, struck a blow that was outside the fair lines. The obvious and clear proper course was for the experienced prosecutor to either ask for a side-bar or a jury recess rather than making the statement in the presence of the jury.

However, any error was cured by the appropriate actions of the trial court. The trial court believed that defense counsel's questions were an attempt to get Detective Tovar to express an opinion as to guilt or innocence and to give the false impression that Detective Tovar had no more information about Delgado's guilt than he had the morning of the arrest. In that respect, defense counsel's questions invited an objection from the prosecutor. However, the substance of the Prosecutor's objection, the statements about inadmissible evidence, and the Defendant's objections thereto, in the presence of the jury, was improper and also improper vouching that other inadmissible evidence existed . The trial court gave this matter careful attention and instructed the jury that statements and arguments of counsel do not constitute evidence and should be disregarded.

Additionally, Petitioner claims that Prosecutor Sullivan engaged in further misconduct during closing argument by arguing that in order to believe defense counsel's statements during closing argument, the jury would have to conclude that a prosecution witness, Detective Merryman, was lying. Petitioner argues, citing *United States v. Richter*, 826 F.2d 206 (2nd Cir. 1987), that arguments about a defendant's opinion of the government's witnesses credibility are irrelevant and interfere with the jury's duty to make credibility determinations.

In *Richter,* the prosecutor asked the defendant on cross-examination as to whether an FBI agent was either mistaken or lying. The Second Circuit found this to be improper cross-examination as determinations of credibility are for the jury. *Id.* at 208. The Second Circuit noted that because no objection was made at this point it may have been inclined to overlook the impropriety if that were the sole claim of error. *Id.* However, the prosecutor then called, over defense objection, another FBI agent as a rebuttal witness to corroborate

the first agent's testimony, which the prosecutor had already forced the defendant to label as false. The Second Circuit found this prosecutorial misconduct to be reversible error. *Id.* at 207.

Here, the alleged misconduct consisted of the following argument that was made by the prosecutor during rebuttal closing argument:

> Detective Merryman told you how it happened. Mr. Scott [defense counsel] suggests that this officer, almost 20 years of experience, is here and perjuring himself. Mr. Scott can cut it, dice it and slice it any way he wants. He's suggesting he came in here and perjured himself. (TR 2524).

When claiming reversible error, it is not enough that the prosecutor's remarks were undesirable or even universally condemned. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quotations and citations omitted). The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Id.* It is the misconduct's effect on the trial, not the blameworthiness of the prosecutor, that is the crucial inquiry for due process purposes. *Smith v. Phillips*, 455 U.S. 209, 220 n. 10 (1982).

The Washington Court of Appeals noted that it is improper for a prosecutor to suggest to the jury that in order to find defendant not guilty the jury would have to find that the law enforcement witness committed perjury. However, the court also noted that defense counsel had not objected to the remarks and that the remarks came in closing argument after the defense had already characterized the question before the jury as the relative credibility of the police and the defendant. The court's conclusion that the prosecutor's response was no more than fairly responsive to a defense argument and did not warrant reversal is not contrary to or an unreasonable application of clearly established federal law.

Although this court finds that the prosecutor's conduct before the jury during cross-examination was inappropriate and his closing argument questionable, the Washington court's conclusion that such conduct by the prosecutor did not warrant reversal is not contrary to or an unreasonable application of clearly established federal law, particularly

in view of the appropriate action of Judge Gavin in dealing with the matter at trial . Petitioner's fourth claim is **DENIED**.

IT IS HEREBY ORDERED:

1. Petitioner's Petition for Writ of Habeas Corpus (Ct. Rec. 1) is **DENIED** .

2. Petitioner's first, second, and fourth claims are denied on the merits. Petitioner's third claim is procedurally defaulted. The Petition For Writ of Habeas Corpus and the claims therein are **dismissed with prejudice.**

IT IS SO ORDERED. The Clerk is hereby directed to file this Order, enter judgment in favor of Respondent, furnish copies to Petitioner and Respondent's counsel, and close the file.

DATED this 25th day of May, 2004.

JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE